85-1588

No.

Supreme Court, U.S.
FILED
MAR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN GERMANN,
Petitioner,

vs.

CITY OF KANSAS CITY, MISSOURI, HONORABLE RICHARD BERKLEY, ROBERT KIPP, JOHN WAAS, THOMAS LEWINSOHN, EDWARD WILSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is the speech of a public employee serving as president of a public employees' union entitled to first amendment protection where such speech addresses an issue of public concern, is uttered in the context of collective bargaining and does not demonstrably impede the efficiency of the public employer in providing governmental services?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit as to the judgment entered in this case.

REPORTS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 776 F.2d 761 (8th Cir. 1985). The opinion of the United States District Court for the Western District of Missouri is reported at 579 F.Supp. 180 (W.D. Mo. 1984).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered on November 6, 1985. Its order denying the petition for rehearing *en banc* was dated and entered on December 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The first amendment to the Constitution of the United States of America, U.S. Const. amend. I, provides as follows:

> **Religious and political freedom.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or breaching the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The fourteenth amendment to the Constitution of the United States of America, U.S. Const. amend. XIV, § 1, provides in relevant part as follows:

> **Citizens of the United States.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner John Germann brought this action against the City of Kansas City, Missouri, the mayor Hon. Richard Berkley, the city manager Robert Kipp, fire chief John Waas, personnel director Thomas Lewinsohn and Edward Wilson. Suit was brought under 42 U.S.C. § 1983 (1976 ed. Supp. V) for violation of Petitioner's right to freedom of speech as secured by the first amendment to the Constitution of the United States of America.

At all times material to this action, Petitioner held the rank of fire captain in the Kansas City fire department. Petitioner was also president of the local fire fighters' union, International Association of Fire Fighters, AFL-CIO, Local No. 42. Petitioner brought this suit alleging that Respondents denied him promotion to the rank of battalion chief in the Kansas City fire department between September, 1977 and September, 1979, due to his protected first amendment activities.

Respondent John Waas was fire chief at all times material. He had the ultimate authority to promote captains to the rank of battalion chief, a promotion he repeatedly denied Petitioner between September, 1977 and September, 1979.

Below the rank of fire chief, in order of command, were deputy fire chiefs, battalion fire chiefs, fire captains, fire apparatus operators, and fire fighters. Battalion chief was the lowest level "management" position in the fire department. Promotions to the rank of battalion chief were controlled by the City Charter, Administrative Code and Personnel Regulations. The first step in the promotion process was a written examination the results of which were compiled into a promotion eligibility list rank-

ing candidates according to their test scores. Each eligibility list remained in effect for approximately 2 years. The eligibility list here in question was effective from September 20, 1977 to September 18, 1979. Whenever a vacancy in the battalion chief ranks occurred, the deputy fire chiefs conducted personal interviews of the first 5 candidates on the list. The fire chief then appointed a new battalion chief from among the 5 candidates interviewed. With the exception of Petitioner, the person appointed was invariably the one at the top of the eligibility list.

During the period from September, 1977 until September, 1979, Petitioner ranked first on the promotion eligibility list for battalion chief. By all accounts, he was well qualified for the position. Nonetheless, Respondent Waas refused to appoint Petitioner to any of the seven vacancies that occurred during this two year period. Thereafter, Petitioner filed suit in the United States District Court for the Western District of Missouri pursuant to 42 U.S.C. § 1983, alleging that Respondents violated his rights under the first and fourteenth amendments by denying him promotion in retaliation for protected first amendment activities undertaken as union president. In addition, Petitioner asserted a pendent state claim for violation of Mo. Rev. Stat. § 105.510 (1978), which prohibits discrimination against public employees because of certain permitted union activities.

After a bench trial the district court found in favor of Respondents basing its decision upon three incidents which occurred between May, 1977 and September, 1979. Briefly, these were the Petitioner's exchange of correspondence with fire chief Waas in May, 1977; a telephone conversation in June, 1978 and a meeting in chief Waas's office in 1979. But the divided appellate panel relied exclusively upon its analysis of the 1977 letters in affirm-

ing the judgment of the district court.[1] The majority decision succinctly describes the circumstances of the letters as follows:

> "Following the strike, in 1976 the union and the city entered into a "Memorandum of Understanding," which, among other things, prohibited management level employees from belonging to the union. In the memorandum the union and the city agreed to make good faith efforts to implement a plan of reorganization of the fire department. The plan included a work schedule change which caused a great deal of friction between the union and the city. In an attempt to resolve conflict in implementing the plan and the memorandum, appellant, as president of the union, and Waas, as fire chief, served as cochairpersons of the Labor/Management Committee. From July 1976 until May 1979, appellant frequently and vigorously opposed Waas, contending that the manner in which Waas was implementing the plan violated union members' rights.
>
> On May 6, 1977, Waas wrote the following letter to appellant in his capacity as union president:
>
> 'This is to register my objection to the officers of Local No. 42 of the fire fighters' union making frequent visits to the Deputy Chief's office at Fire Station No. 10 to obstruct and try to alter the operation of the Fire Department.
>
> This practice is in direct violation of the Memorandum of Understanding, which sets forth a

1. "Our finding that after receiving Germann's May 11 letter, Waas was justified in not promoting [Germann] to battalion chief makes unnecessary a separate *Pickering* analysis of the 1978 telephone conversation and 1979 name calling incident." (A-10).

> Labor/Management Committee to review procedures. I respectfully request that you refrain from any further such practice.'

Copies of the letter were mailed to certain city and fire department officials.

On May 11, 1977, appellant responded to Waas by the following letter, which provided in part:

> 'In answer to your letter of May 6, how dare anyone who has done as much as you to tear the Kansas City fire department to shred accuse someone else of attempted obstruction or alteration. With your hand at the controls, the Kansas City Fire Department could not possibly be more completely obstructed by anyone else on the face of the earth.
>
> Nothing would suit me better than to have a Fire Chief who would read and understand his own rules, give his word on an issue and then not violate his own word by his every action as you have . . .
>
> . . . .
>
> If you are really interested in seeing the Memorandum upheld, I suggest some study courses for yourself and the rest of the chief officers under the direction of someone who does not carry such a pitifully twisted outlook toward the employees of the department as you seem to have developed.'

Appellant mailed copies of his letter to the officials who had received Waas's letter and to the attorneys for the city and the union.

> During the period from September 1977 until September 1979, appellant was ranked first on the promotion eligibility list for battalion chief. It is undisputed that appellant was qualified for the position. Waas, however, did not appoint appellant to any of the seven vacancies that occurred during this period. (A-3, 4)."

The panel majority, correcting the district court, concluded that Petitioner's letter to Waas addressed a matter of public concern.

> "In determining whether speech addresses a matter of public concern, we consider the 'content, form, and context of a given statement, as revealed by the whole record' *Roberts v. Van Buren Public Schools,* No. 84-2244, slip op. at 8 (8th Cir. Sept. 11, 1985) (Roberts), citing *Connick v. Myers,* 461 U.S. 138, 147-48 & n.7 (1983). Speech addressing private interests, such as employee grievances or disagreements with internal policies, is not subject to the Pickering balance. Roberts, slip op. at 8. Here, because appellant's letter concerned implementation of the fire plan during a time of great media attention, it addressed a matter of public concern. Contrary to the district court's suggestion, the fact that appellant's concerns were expressed in a letter addressed to Waas does not negate the public nature of the speech. *See Id.* (A-8, fn. 2)."

Nonetheless, and despite the absence of any evidence that a close working relationship with Waas would have been required had Germann been promoted, or of any disruption in the workplace, the majority sanctioned Waas's refusal to promote Petitioner because it disapproved of the "tone" of his May 11, 1977 letter.

"Although we agree that the May 11 letter addressed a matter of public concern [footnote omitted], we nonetheless must consider the tone of the letter." (A-8).

ARGUMENT

The Court Of Appeals Failed Not Only To Give Deference To The Protected Nature Of Germann's Speech Which Addressed A Matter Of Public Concern But Failed Wholly To Take Into Account That Such Speech Was Uttered By The Union President In The Context Of Collective Bargaining.

The essence of this case was summarized by Circuit Judge Heaney in his dissenting opinion below.

"What we come down to then is that the fire chief refused to promote Germann because Germann had led the union's opposition to the departmental reorganization. The district court and this Court closed their eyes to this fact and hinged their rulings on Waas's testimony that he objected to the tone of Germann's May 11, 1977, letter and found it to be personally insulting. In my view, this is unadulterated nonsense. Germann was acting as president of the union when he sent the letter to the chief and was expressing his views in plain, albeit vigorous, language understandable to every working man. Such language is not uncommon in labor management disputes." (From the dissenting opinion of Heaney, Circuit Judge, A-12).

Not only did the appellate majority utterly fail to appreciate the labor/management context in which Ger-

mann's letter was penned, it misconstrued and misapplied the standard established by the Supreme Court for assessing the degree of protection the constitution affords all public employees when speaking on issues of public concern. In *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968), and *Connick v. Myers,* 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed.2d 708 (1983), respectively, this Court enunciated, then refined, the standard by which a public employee's speech is to be evaluated in the light of the first amendment.

In *Pickering,* the Court found that absent maliciously false statements, a teacher's exercise of his right to speak out on issues of public concern could not provide the basis for his dismissal from public employment. The Court in *Pickering* noted the necessity to strike

> "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

In *Connick,* the Court made clear that the constitution did not provide an unlimited license and that speech by a public employee on personal grievances was entitled to less protection. *Connick* arose as a result of employee Myers' termination for insubordination and interference with working relationships within the New Orleans District Attorney's office. 461 U.S. at 151.

Myers had been informed that she would be transferred to a different department within the district attorney's office. Unhappy about the assignment, she prepared and distributed a questionnaire among the other employees. Upon learning of the questionnaire's distribu-

tion, the district attorney called Myers into his office and terminated her. Myers brought suit under 42 U.S.C. § 1983, the same jurisdictional basis invoked by Petitioner Germann. Myers claimed that she was wrongfully terminated in response to lawful exercise of her constitutional right of free speech. Both the district court and the court of appeals concurred that the speech, i.e. the questionnaire, was within the protection of the first amendment. This Court reversed in a 5-4 decision.

It was found that Myers' actions related only to her personal situation and did not reach any issue of public concern. In fact, only a single item in the entire questionnaire was found even to touch upon a matter of public importance. Such was central to the Court's analysis which observed that greater deference is mandated by the constitution when matters of public concern are truly at issue.

> "We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Ibid.* at 152.

We submit that this is a case, as envisioned in *Connick,* wherein matters of public concern are so substantially involved that only the strongest affirmative demonstration of actual adverse impact upon the operation of the fire department could have properly sustained the department's discrimination against Germann. Where could public employee speech more substantially involve matters of public concern than where the employee is also president of a local union of hundreds of fire fighters and addresses his management counterpart in collective bargaining about items of general public interest? Nevertheless, although the majority below recognized that the May 11 letter indeed addressed a matter of public con-

cern (A-8), overriding concern with the offensive tone of the letter led the majority away from the precepts of Pickering and to misplaced reliance upon *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n.4 (1979).

In *Givhan* it was stated that "when a government employee personally confronts his . . . supervisor, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time or place it is delivered." *Ibid.* From this, the majority below extrapolated that the critical tone of Germann's May 11 letter could be included as a negative factor in the *Pickering* calculation. As noted in the dissent, however, the cited reference to *Givhan* is entirely inapplicable to circumstances of *public* expression.

> "The quoted footnote from *Givhan,* however, limits consideration of time, place and manner to *private* expressions . . . In the case of *public* expression, such as the May 11 letter, 'it is generally the *content* of his statements that must be assessed to determine whether they in any way either impeded the teacher's proper performance of his daily duties . . . or . . . interfered with the regular operation of the schools generally.' " (Emphasis added). (Dissenting opinion of Heaney, Circuit Judge, quoting from *Givhan, Ibid.*).

Moreover, in the absence of any contention by Respondents that Germann's statements were false or libelous, *Pickering* itself rendered irrelevant the appellate majority's effort to attach proper weight to the "tone" of the May 11 letter.

> "Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on

> matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it." *Pickering, supra* at 570.

Even if the tone of Germann's letter or its impact upon the fire chief were material, the circumstances here are so dissimilar from those considered in *Connick* as to greatly distinguish them from the unfortunate case of the assistant district attorney. *Connick* did not construe facts comparable to those at hand.

Unlike the situation in *Connick,* no close working relationship was found to exist between a battalion chief and the fire chief. "The evidence was that personal contact was limited to a two hour weekly staff meeting." (A-9). In *Connick,* this Court accepted the district court's finding that the maintenance of close working relationships between assistant district attorneys and their superiors was "important to the efficient and successful operation of the district attorney's office . . ." *Ibid.* at 151. There being no such proximity between battalion chief and fire chief, the court of appeals here relied upon the inverse notion that precisely "because close supervision of a battalion chief by the fire chief was impossible, personal loyalty to the chief was critical to the management structure of the fire department." *Ibid.* In this regard, the court of appeals clearly departed from the dictates of this Court,[2] displacing constitutional law with its subjective evaluation of decorum in industrial relations.

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2. The circumstances here are more closely akin to those in *Pickering* where the Court found that "Appellant's employment relationship with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can be persuasively claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U.S. at 570.

The decisions of this Court have sanctioned a lower court's reliance upon notions of personal loyalty only where "close working relationships" were found to exist in the context of day-to-day interaction. *Pickering,* 391 U.S. at 570. Moreover, neither *Pickering* nor *Connick* considered the duty of loyalty and confidence in the context of labor-management communications involving issues of public concern. In particular, *Connick* involved an employee who was quite clearly agitating emotions within her office solely to serve her own ends. The effort of the Eighth Circuit to size the facts of the instant case according to the strictures of an inopposite analysis in *Connick* results in a poor fit which unduly binds the parties in labor-management relations and is abrasive to this Court's ". . . commitment to the principle that [such] debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Linn v. United Plant Guard Workers, Local No. 114,* 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed.2d 582 (1966), quoting from *New York Times Company v. Sullivan,* 376 U.S. 254, 270 (1964).

In making its assumptions as to loyalty, the court below sought support from this Court's statement in *Connick* to the effect that an employer need not allow events to unfold to the extent that the destruction of working relationships is manifest before taking action. *Connick,* 461 U.S. at 152. But the appellate court's substantial reliance on this observation ignores the overriding concern of the Court "that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Ibid.* Quite helpful in illustrating the increased degree of deference to which a public employee's speech is entitled when addresssing matters of public concern is the recent decision of the United States Court of

Appeals for the Fifth Circuit in *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985).

In *Gonzalez, supra,* the Fifth Circuit analyzed a situation similar in many respects to that at bar. There, the Plaintiff was an executive director of a Community Action Agency (CAA) in Webb County, Texas. The CAA was overseen by the Webb County Commissioners Court, which appointed the senior staff and Executive Director of the CAA. The Commissioners Court also appointed an Administering Board to oversee CAA planning and administration. *Ibid.* at 1297. In May of 1980, Plaintiff Gonzalez discharged the deputy director of the CAA, Oscar Chavez. The Commissioners Court reinstated Chavez, publically reprimanded Gonzalez for exceeding his authority, and began an investigation into Gonzalez's job performance. *Ibid.* at 1298. Thereafter, Gonzalez appeared before the Commissioners Court and publicly declared that its investigation of his activities was in violation of CAA Regulations. Gonzalez also testified at a lengthy closed session before the Commissioners Court, maintaining that he was specifically authorized to dismiss any employee under a regulation approved by the Commissioners. The Commissioners demanded that Gonzalez publicly acknowedge their authority to evaluate his performance. Gonzalez refused, and the Commissioners fired him. *Ibid.* Gonzalez filed suit under 42 U.S.C. § 1983, contending, *inter alia,* that he was discharged in retaliation for the exercise of speech protected by the first and fourteenth amendments. Gonzalez's case was twice considered by the Fifth Circuit Court of Appeals which ultimately affirmed a judgment in his favor.

The Fifth Circuit held that, while Gonzalez owed a duty of loyalty to the Commissioners Court, his speech was, nevertheless, protected. The Court weighed the

speech against its impact upon the "fragile relationship" which existed between Gonzalez and the Commissioners Court. *Ibid.* at 1302. However, the Defendants in *Gonzalez* were unable to prove that Gonzalez's speech was likely to undermine the Commissioners' political program. *Ibid.* at 1302.

Even more so here than in *Gonzalez,* the record is void of evidence that Germann did or would have impeded operation of the city's fire protection plan or that Petitioner's May 11 letter disrupted the operation of the fire department. Despite Respondent Waas's admission of this central fact,[3] the Appellate Court chose to substitute speculation as to what might have happened for that which was actually the case. This situation contrasts sharply with that in *Gonzalez* where the public employee actually refused to comply with the directives of management but where speech to this effect was, nevertheless, found to be protected.

The Fifth Circuit determined that, despite the fact that Gonzalez refused a direct order from his supervisors in a context in which personal loyalty was owed, the employee's free speech rights were paramount and, nonetheless protected. Clearly, the Fifth Circuit's decision in *Gonzalez* is more fully in accord with the precedents of this Court in *Pickering* and *Connick* which dictate that while a public employee's right to speech may not be unlimited, it is substantial when addressing items of public concern.

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3. On cross-examination, Respondent Waas testified:

Q: Would you tell me specifically any instances you can of how that letter - Mr. Germann's letter of May 11, interfered with the operation of the fire department?

A: It didn't. (Transcript of Proceedings, p. 439).

The factors cited by this Court in *Pickering* and *Connick* similarly compel the finding that Petitioner's May 11, 1977 letter was protected speech. No close working relationship existed between a battalion chief and the fire chief which was to be upset by Petitioner's vigorous advocacy on behalf of the hundreds of fire fighters whose interests it was his right and duty to represent. In addition, no evidence was adduced to indicate that Petitioner's letter disrupted in any way the working relationship of any fire department employees. (A-9, 10).

In *Connick,* this Court deemed reasonable the district attorney's belief that Myers' speech *might* lead to a disruption in working relationships within the district attorney's office. 461 U.S. at 152. In the instant case, however, Germann's letter was "published" four full months prior to the commencement of the relevant time period.[4] Thus, the Court of Appeals erred in seeking to rely upon the pronouncement in *Connick*: "We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifested before taking action." *Ibid.* at 152. Such is simply inapplicable to the instant situation, where events had substantially unfolded without incident prior to Germann's appearance at the top of the promotion list some four months later. Thus, the Court of Appeals improperly imputed a presumption of potential disruption where such was rebutted by the facts.

Assessment of the other factors articulated in *Pickering* and *Connick* similarly weigh in favor of Petitioner.

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4. Germann's letter was dated May 11, 1977 and received shortly thereafter. Germann was ranked first on the Battalion Chief's eligibility list as of September 20, 1977 and remained there for two years. During this period, seven fellow Fire Captains were promoted to Battalion Chief over Petitioner.

As noted by Circuit Judge Heaney in his dissenting opinion, Petitioner was indisputably well-qualified for the position of battalion chief. Throughout September, 1977 through September, 1979, Petitioner ranked first on the promotion/eligibility list for battalion chief. When given the opportunity to work "out of class" on a temporary basis, as was often done, Petitioner carried out the duties of the position he sought quite efficiently, without evidence of disloyalty and without disrupting the department. (A-11, 12). The record indicates, without contradiction, that Germann *always* cooperated with the fire chief in carrying out his duties as fire captain and as "acting" battalion chief. *Ibid.* Finally, there existed no record of any disciplinary action whatsoever against Petitioner during 22 long years of service to the Kansas City, Missouri fire department.

Captain Germann's letter was written as union president in response to the accusations of the fire chief. This exchange did not occur in the conventional context of an employer-employee relationship but in that of an exchange between principal representatives in a labor-management debate. This fact was given short-shrift, if noticed at all, by the courts below. While the appellate panel was compelled to conclude that the speech addressed matters of public concern, the majority failed to heed the Court's cautionary instruction that the constitution cuts a broader path of protection in such circumstances. To the contrary, the court of appeals restricted the protective sweep of the first amendment as surveyed in *Pickering*.

The balancing test established in *Pickering* can clearly take account of and be sensitive to the requirements of collective bargaining and the relatively uninhibited exchange that must be allowed between management and

employee representatives. Where, as here, the speech arises in the context of labor/management relations, addresses a matter of public concern, demonstrably does not diminish efficiency in the department and a close working relationship between the apparent antagonists is not required upon promotion, a public employee/union spokesman should not, consistent with *Pickering* and the first amendment be denied advancement absent an affirmative demonstration by the employer that the speech, otherwise protected, is *likely* to impede the employee's ability to perform his or her duties. But the record in this case belies any notion that John Germann was at anytime, or was ever likely to be, any less dedicated or effective in the business of his public employer than he was in the representation of his fellow fire fighters.

> "Instead, one could just as reasonably draw the conclusion that appointment of Germann as battalion chief would restore harmony to the department because he was obviously qualified and had represented the union and its members so vigorously." (Heaney dissent, A-12).

It is beyond cavil that Petitioner was denied promotion because of his letter of May 11, 1977. Likewise, it is clear that such was written in his capacity as local union president responding to a pointed accusation by the chief spokesman of management. The record fails to support a finding as to any of the deleterious circumstances envisioned in *Pickering* in which the protection of the first amendment might be denied. Thus, John Germann, a 22 year veteran fire captain with an impeccable service record and at the top of the eligibility list was denied promotion because, as union president, he publicly opposed (strongly, resolutely but civilly) certain policies of

the city management as was the will of his constituents. As noted in dissent by Judge Heaney, the affirmance of such by the court of appeals conveys an unmistakable message to public employees. On balance, such is not a message which affords the fundamental freedom to speak on issues of public concern much weight.

> "The firemen of the Kansas City Fire Department will receive only one message from the majorities opinion. That message is:
>
> 'It does not matter how hard you work or how well you do on promotional exams; if you act as the voice of your fellow employees in matters of great concern to them, then your chances for promotion are nil.' The interests of the Kansas City Fire Department will not be well served by such an attitude." (A-14).

SUMMARY

This Court has yet to focus the first amendment on speech uttered in the context of public sector collective bargaining. Large numbers of public employees, such as Germann, labor for public employers in states where sophisticated labor legislation is not in place and their limited panoply of protection derives almost exclusively from the guarantees of the federal constitution. Not only has the appellate court's decision failed to consider the context in which Germann's speech occurred, it would allow the parameters of protected speech to vary according to the unique personality of each public employer.

Germann's letter, written on his own time, as union president, responding to allegations of the fire chief and addressing items of concern to Kansas Citians generally, was not slanderous, did not disrupt the workplace or

improperly impede the fire department in carrying out its mission. Nevertheless, an impeccably qualified fire captain was denied promotion to a low level management position solely because the department head took umbrage at the tone of a responsive letter prepared at the union hall and typed on union stationery. While the constitution may require recognition of the "fragile relationship" of such public employment, the scope of first amendment protections cannot be dependent upon the subjective state of mind of the public employee's superior. Such an ethereal standard would chill debate on public issues which is essential to democratic deliberation by denying public employees effective first amendment protection in the same manner that the majority decision of the appellate court has allowed Captain Germann to be punished for serving as union president.

CONCLUSION

A Writ Of Certiorari to the Eighth Circuit Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1261

John Germann,
Appellant,

v.

City of Kansas City, Hon. Richard Berkley, Robert Kipp, John Waas, Thomas Lewinsohn, Edward Wilson,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 16, 1985
Filed: November 6, 1985

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

John Germann appeals from a final judgment entered in the District Court[1] for the Western District of Missouri in favor of the City of Kansas City, Missouri, Edward Wilson and John Waas. *Germann v. City of Kansas City*, 579 F.Supp. 180 (W.D. Mo. 1984). For reversal appellant argues that the district court erred in failing to find that

1. The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

appellees violated his federal constitutional and state statutory rights by denying him promotions to the rank of battalion chief in the City of Kansas City, Missouri, fire department between September 1977 and September 1979. Appellant alleged that appellees had denied him promotions because of protected first amendment activities. For the reasons discussed below, we affirm the judgment of the district court.

Appellant has been employed by the fire department since 1961. In July 1971 he was promoted to the rank of fire captain. In addition, from 1976 until 1981, appellant was president of the firefighters' union, International Association of Firefighters, AFL-CIO, Local No. 42.

The fire department is part of the municipal government of the City of Kansas City and is supervised by the director of fire and the fire chief. Appellee John Waas was fire chief at all times relevant to this action. Since Waas's retirement in 1980, Edward Wilson has been fire chief.

Below the rank of fire chief in order of command are deputy fire chiefs, battalion fire chiefs, fire captains, fire apparatus operators, and firefighters. Battalion chief is the lowest level management position. Promotion from fire captain to battalion chief is regulated by the city charter, administrative code, and personnel regulations. Candidates are ranked on a promotion eligibility list on the basis of written test results. Whenever a vacancy occurs, the deputy fire chiefs conduct personal interviews of the first five candidates on the list. The fire chief then appoints the battalion chief from the five candidates.

During the time period relevant to this action, the fire department experienced great turmoil and received much media attention. In October 1975 the union con-

ducted a four-day strike. At this time all management level employees except for fire chief were members of the union; thus, during the strike Chief Waas was the only professionally trained firefighter on duty for the city.

Following the strike, in 1976 the union and the city entered into a "Memorandum of Understanding," which, among other things, prohibited management level employees from belonging to the union. In the memorandum the union and the city agreed to make good faith efforts to implement a plan of reorganization of the fire department. The plan included a work schedule change which caused a great deal of friction between the union and the city. In an attempt to resolve conflict in implementing the plan and the memorandum, appellant, as president of the union, and Waas, as fire chief, served as cochairpersons of the Labor/Management Committee. From July 1976 until May 1979, appellant frequently and vigorously opposed Waas, contending that the manner in which Waas was implementing the plan violated union members' rights.

On May 6, 1977, Waas wrote the following letter to appellant in his capacity as union president:

> This is to register my objection to the officers of Local #42 of the fire fighters' union making frequent visits to the Deputy Chief's office at Fire Station #10 to obstruct and try to alter the operation of the Fire Department.
>
> This practice is in direct violation of the Memorandum of Understanding, which sets forth a Labor/Management Committee to review procedures. I respectfully request that you refrain from any further such practice.

Copies of the letter were mailed to certain city and fire department officials.

On May 11, 1977, appellant responded to Waas by the following letter, which provided in part:

> In answer to your letter of May 6, how dare anyone who has done as much as you to tear the Kansas City fire department to shreds accuse someone else of attempted obstruction or alteration. With your hand at the controls, the Kansas City Fire Department could not possibly be more completely obstructed by anyone else on the face of the earth.
>
> Nothing would suit me better than to have a Fire Chief who would read and understand his own rules, give his word on an issue and then not violate his own word by his every action as you have. . . .
>
> . . . .
>
> If you are really interested in seeing the Memorandum upheld, I suggest some study courses for yourself and the rest of the chief officers under the direction of someone who does not carry such a pitifully twisted outlook toward the employees of the department as you seem to have developed.

Appellant mailed copies of his letter to the officials who had received Waas's letter and to the attorneys for the city and the union.

During the period from September 1977 until September 1979, appellant was ranked first on the promotion eligibility list for battalion chief. It is undisputed that appellant was qualified for the position. Waas, however, did not appoint appellant to any of the seven vacancies that occurred during this period.

Appellant then filed an action in district court pursuant to 42 U.S.C. § 1983, alleging that appellees violated his rights under the first and fourteenth amendments by denying him promotions in retaliation for protected union activities. In addition, appellant asserted as a pendent state claim a violation of Mo. Rev. Stat. § 105.510 (1978), which prohibits discrimination against public employees because of certain permitted union activities.

At the bench trial Waas testified that he had not promoted appellant to battalion chief because he questioned appellant's loyalty and whether appellant would work under him to implement his policies. Waas believed that discipline, morale, and efficiency in the fire department depended upon respect being shown to rank. In addition, Waas stated that he relied on management employees to implement his policies on a day-to-day basis in the field.

In support of his belief that appellant would be unsuitable as a management employee, Waas cited appellant's May 11 letter. Waas found the letter personally insulting and an inappropriate response to his letter of May 6. In addition, Waas testified to a 1979 incident which confirmed his belief that appellant did not respect and would therefore not support him as fire chief. The district court credited Waas's testimony that in 1979 appellant came to Waas's office to inquire why he had not been promoted. After Waas did not respond, appellant became hostile and called Waas a "chicken shit." Waas also testified that he believed that appellant had not wanted a promotion to battalion chief. The district court credited Waas's testimony about a 1978 telephone conversation in which appellant indicated he did not want a promotion at that time because he would have to resign as union president.

The district court noted that appellant's testimony concerning the conversation revealed hostility toward and suspicion of Waas.

The district court found that appellees had not discriminated against appellant because of union activities. The district court believed that after receipt of appellant's May 11 letter, Waas was justified in not promoting appellant to battalion chief. Applying the balancing test set forth in *Pickering v. Board of Education,* 391 U.S. 563 (1968), the district court held that "governmental interests in promoting the efficiency and morale of a department with a crucial public safety mission outweigh [appellant's] interest in speaking in the manner, time, and place which he chose." *Germann v. City of Kansas City,* 579 F. Supp. at 187. Because the district court found that appellees had not discriminated against appellant on the basis of union activity, the district court dismissed his pendent state claim.

This court has recently stated that " 'the first amendment is violated by state action whose purpose is . . . to intimidate public employees . . . from taking an active part in [union] affairs or to retaliate against those who do.' " *Roberts v. Van Buren Public Schools,* No. 84-2244, slip op. at 12 (8th Cir. Sept. 11, 1985) (*Roberts*), *citing Professional Ass'n of College Educators v. El Paso County Community College District,* 730 F.2d 258, 262 (5th Cir.), *cert. denied,* 105 S. Ct. 248 (1984). However, the court went on to state that "[a]s in the case of speech, . . . an associational right [to join and participate in a union] must be balanced against, and may be overridden by, the government's interest as an employer in efficiency." *Roberts,* slip op. at 12 (relying on *Pickering v. Board of Education,* 391 U.S. at 567).

In applying the *Pickering* balance, courts should consider the following factors:

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Bowman v. Pulaski County Special School District, 723 F.2d 640, 644 (8th Cir. 1983). It must be kept in mind, however, that the *Pickering* balance is flexible and the weight to be given to any factor varies depending on the circumstances of the case. *Egger v. Phillips,* 710 F.2d 292, 319 (7th Cir.), *cert. denied,* 104 S. Ct. 284 (1983). Resolution of the *Pickering* balance is a question of law dependent on underlying factual findings. *Brockwell v. Norton,* 732 F.2d 664, 667 (8th Cir. 1984).

For reversal appellant contends that the district court erred in accepting Waas's reliance on the May 11 letter as a lawful basis on which to deny promotion. Appellant maintains that under *Pickering* the letter was protected first amendment activity because the letter addressed a matter of public concern, did not create disharmony in the working place or impede his performance of his duties. Based on our independent consideration of the relevant facts as found by the district court, we disagree.

Although we agree that the May 11 letter addressed a matter of public concern,[2] we nonetheless must consider the tone of the letter. "When a government employee personally confronts his . . . supervisor, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also in the manner, time or place in which it is delivered." *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n.4 (1979). Appellant's May 11 letter accused Waas of being a liar, tearing the department to "shreds," having a "pitifully twisted outlook," and obstructing the department "more completely [than] anyone else on the face of the earth." After receipt of the May 11 letter, Waas understandably felt personally insulted and reasonably questioned appellant's loyalty and respect for him as fire chief and whether appellant would promote and implement department policy. The May 11 letter expressed a degree of personal animosity and distrust beyond the sharp conflict which could be expected as a consequence of forceful representation of opposing interests. *Compare Hickman v. Valley Local School District Board of Education,* 619 F.2d 606, 609 (6th Cir. 1980) (personality conflict between president of teacher's union and school principal resulting from union negotiations did not justify teacher's dismissal).

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2. "In determining whether speech addresses a matter of public concern, we consider the 'content, form, and context of a given statement, as revealed by the whole record.'" *Roberts v. Van Buren Public Schools,* No. 84-2244, slip op. at 8 (8th Cir. Sept. 11, 1985) (*Roberts*), *citing Connick v. Myers,* 461 U.S. 138, 147-48 & n.7 (1983). Speech addressing private interests, such as employee grievances or disagreements with internal policies, is not subject to the *Pickering* balance. *Roberts,* slip op. at 8. Here, because appellant's letter concerned implementation of the fire plan during a time of great media attention, it addressed a matter of public concern. Contrary to the district court's suggestion, the fact that appellant's concerns were expressed in a letter addressed to Waas does not negate the public nature of the speech. *See id.*

Appellant argues that the fact that the letter was personally insulting to Waas is irrelevant because of the absence of a close working relationship between a battalion chief and the fire chief. The evidence was that personal contact was limited to a two-hour weekly staff meeting. Although in other cases the presence of a close working relationship was critical, *e.g., Connick v. Myers,* 461 U.S. 138, 151 (1983), "blind insistence upon the presence of an intimate working relationship gives to *Pickering* precisely that rigidity and formalistic structure that the Court so recently denied in *Connick.*" *Gonzales v. Benavides,* 712 F.2d 142, 148 (5th Cir. 1983). Here, as the district court noted, because close supervision of a battalion chief by the fire chief was impossible, personal loyalty to the chief was critical to the management structure of the fire department. As was recently stated by the Federal Circuit, " '[c]ohesive operation of management is dependent on the loyalty of inferior management. . . . For management to countenance disloyalty . . . would be for management to render itself impotent.' " *Brown v. Department of Transportation,* 735 F.2d 543, 547 (Fed. Cir. 1984) (*Brown*), *citing Brousseau v. United States,* 640 F.2d 1235, 1249 (Ct. Cl. 1981).

Appellant also argues that the *Pickering* balance favors him because of the absence of evidence that the May 11 letter caused actual disruption in the work place or impeded his ability to perform his duties. On the facts of this case, appellant "place[s] too great a burden on the agency to show harm." *Brown,* 735 F.2d at 547-48. Although in other cases evidence demonstrating actual disruption of work, *e.g., Hughes v. Whitmer,* 714 F.2d 1407, 1424 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 1278 (1984), or impaired performance, *Nathanson v. United States,* 702 F.2d 162 (8th Cir.), *cert. denied,* 104 S. Ct. 352 (1983), was

significant, the absence of such evidence in this case is not critical. It is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *Connick v. Myers,* 461 U.S. at 152. Appellant's comments were made after a firefighters' strike and amidst great turmoil in the fire department. *See Brown,* 735 F.2d at 547-48 (despite absence of evidence demonstrating substantial harm or interference, nonunion supervisory air traffic controllers' comments encouraging an illegal strike were not protected given timing of comments and agency's interest in insuring safety during an emergency situation resulting from strike). Furthermore, we defer to the district court's finding that at trial appellant continued to demonstrate a great deal of personal hostility and suspicion of Waas. "In this state of affairs it would be folly [for an appellate court] to presume," *Janusaitis v. Middleburg Volunteer Fire Department,* 607 F.2d 17, 27 (2d Cir. 1979), that appellant as battalion chief would respect Waas and work diligently to implement and promote his policies.

Our finding that after receiving appellant's May 11 letter Waas was justified in not promoting appellant to battalion chief makes unnecessary a separate *Pickering* analysis of the 1978 telephone conversation and 1979 name calling incident. We note, however, that these instances are indicative of appellant's continuing hostility and disrespect for Waas. Our holding that the May 11 letter was unprotected under *Pickering* also makes it unnecessary to address appellant's contentions that he was discriminated against because he was a named plaintiff in a state lawsuit challenging the exclusion of management employees from the union and had criticized public officials and that the city had a policy of discriminating against union leader-

ship. *See Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977) (an employer can defeat an employee's first amendment claim by demonstrating that the same employment decision would have been made in the absence of protected conduct).[3] Because appellant was not discriminated against on the basis of protected union activities, the district court correctly dismissed appellant's pendent state claim.

Accordingly, the judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. In my view, the district court clearly erred in holding that the appellees did not violate Germann's federal constitutional rights by denying him promotion to the rank of battalion fire chief in the City of Kansas City.

First, the record is clear that Germann was an excellent employee, that he ranked number one on the promotion list for battalion chief, that he received high marks on every efficiency report, that he frequently served as acting battalion chief, and that, on each such occasion, he

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3. In analyzing a first amendment claim by a public employee, a

> court must determine (1) whether the plaintiff has carried the burden of demonstrating that he engaged in protected activity, (2) whether the protected activity was a substantial or motivating factor in the actions taken against the plaintiff, and (3) whether the defendant has defeated the plaintiff's claim by demonstrating that the same action would have been taken in the absence of the protected activity.

Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 643-44 (8th Cir. 1983) (citations omitted).

Because we find that appellant's May 11 letter was unprotected activity, our analysis in this case was limited to the first step.

efficiently carried out the duties of that position. Second, the record supports Germann's contention that he *always* cooperated with the fire chief in carrying out his duties as fire captain and acting battalion chief. Third, there is no record of any disciplinary actions against Germann at any time during his over twenty-two years employment with the Kansas City Fire Department. Germann's only problem was that he was the president of the local union and vigorously represented the Union's position with regard to the reorganization of work shifts. The Union and Germann, as its president, had every right to vigorously present its position on this reorganization.

There is absolutely no evidence in the record to support the district court's finding that the morale of the department would be damaged if Germann was appointed fire chief. That conclusion is entirely speculative and is not supported by either written exhibits or oral testimony. Instead, one could just as reasonably draw the conclusion that appointment of Germann as battalion chief would restore harmony to the department because he was obviously qualified and had represented the Union and its members so vigorously.

What we come down to then is that the fire chief refused to promote Germann because Germann had led the Union's opposition to the departmental reorganization. The district court and this Court close their eyes to this fact and hinge their rulings on Waas's testimony that he objected to the tone of Germann's May 11, 1977, letter and found it to be personally insulting. In my view, this is unadulterated nonsense. Germann was acting as president of the Union when he sent the letter to the chief and was expressing his views in plain, albeit vigorous, language understandable to every working man. Such language is not uncommon in labor-management disputes.

See Hickman v. Valley Local School District Board of Education, 619 F.2d 606, 609 (6th Cir. 1980).

The majority opinion states that

> [a]lthough we agree that the May 11 letter addressed a matter of public concern, we nonetheless must consider the tone of the letter. "When a government employee personally confronts his . . . supervisor, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also in the manner, time or place in which it is delivered." *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n.4 (1979). [Footnote omitted.]

The quoted footnote from *Givhan,* however, limits consideration of time, place and manner to *private* expressions. *Id.* In the case of *public* expression, such as the May 11 letter, "it is generally the *content* of his statements that must be assessed to determine whether they in any way either impeded the teacher's proper performance of his daily duties * * * or * * * interfered with the regular operation of the schools generally." *Givhan,* 439 U.S. at 415 n.4. In *Connick v. Myers,* 461 U.S. 138 (1983), the Court considered the time, place and manner of the disputed communication only because it "touched upon matters of public concern in only a most limited sense[.]" *Id.* at 154. "We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152. Here, the May 11 letter was squarely addressed to a matter of public concern and the letter's strong language is directly traceable to Germann's representation of his Union on a hotly disputed and emotional issue. Neither the letter's content or tone, to the extent relevant, justifies Germann's nonpromotion.

The fireman of the Kansas City Fire Department will receive only one message from the majority's opinion. That message is: "It does not matter how hard you work or how well you do on promotional exams; if you act as the voice of your fellow employees in matters of great concern to them, then your chances of promotion are nil." The interests of the Kansas City Fire Department will not be well served by such an attitude.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 80-0499-CV-W-2-9

JOHN GERMANN,
Plaintiff,

v.

CITY OF KANSAS CITY, MISSOURI, et al,
Defendants.

MEMORANDUM OPINION AND ORDER

In this case, plaintiff, a captain in the Kansas City Fire Department, claims that the City of Kansas City and John Waas, Director of the Department of Fire until April 9, 1980, and Edward Wilson, Waas' successor, violated his federal constitutional rights by not promoting him to battalion fire chief. Specifically, plaintiff alleges that defendants refused to promote him because of what he said as president of the union and because of his union membership. Also, plaintiff asserts that the defendants violated § 105.510 R.S.Mo. by discriminating against him because of his union affiliation.

Findings of Fact

Plaintiff John Germann has been employed by the Kansas City, Missouri, Fire Department for over 22 years. Since July 27, 1971, he has been a fire captain. From

January 1, 1976, to December 31, 1981, Germann was President of Local Union No. 42 of the International Association of Firefighters, AFL-CIO (hereafter union).

The Kansas City, Missouri, Fire Department is part of the municipal government of the City of Kansas City and is supervised and controlled by the Director of the Fire Department. "The director of the fire department shall have charge of the prevention and suppression of fires and of all employees, buildings and equipment used for this purpose." § 31, City Charter. The Director of the Fire Department was commonly referred to as the "Chief."

Defendant John Waas (hereinafter Waas) was the Director of the Fire Department during all times relevant to this lawsuit. Waas retired as Fire Director on April 9, 1980. Since Waas' retirement, defendant Edward Wilson has been acting and then permanent Director of the Kansas City, Missouri, Fire Department.

Below the fire chief in the chain of command are the deputy fire chiefs, battalion fire chiefs, and fire captains. Seven battalion chiefs are on duty at a time. Each battalion chief supervises six to eight fire companies totalling 25-30 people. Six to eight fire captains report directly to each battalion chief.

In October, 1975, the union went on strike. All union members, including deputy and battalion chiefs, refused to report to work. Chief Waas was the only professionally trained firefighter on duty for a period of four days.

Thereafter, the city and the union executed a Memorandum of Understanding which provided for the reorganization of the fire department, raised wages and prohibited supervisors from belonging to the same labor organizations as the employees they supervised.

The planned reorganization of the fire department was referred to in Article XXII of the agreement in part as follows:

> The city is endeavoring in good faith to implement a plan of reorganization for the Fire Department. Those increases tied to the plan will be paid on the dates set forth in this Memorandum provided that the Union and its members fulfill their commitments herein. For the purpose of this commitment, the implementation of the plan shall be measured by the scheduling (or proposed scheduling) of Firefighters on other than a 24 hour workday basis. The Union and its members agree that they will act in good faith to implement the plan and will use their best efforts to insure its success. . . .

The union recognized in Article I of the agreement that:

> [t]he City feels that it needs a satisfactory number of supervisors who are not affiliated with any labor organization which admits to membership nonsupervisory fire service employees in order to effectively implement the reorganization of the Fire Department and generally for the purpose of management of the Fire Department. . . .

Local No. 42 was recognized as the "exclusive bargaining representative for all firefighters, fire apparatus operators, captains . . . and any employees in positions which may be created below the rank of captain . . . ." Memorandum, Art. I. However, the union was prohibited from representing "supervisors, including battalion chief, deputy fire chief, superintendent of garage, superintendent of alarm, and chief fire prevention inspectors." *Id.*

Nothing in the Memorandum of Understanding was to be "construed as an attempt to limit the discretion of the appointing authority conferred by Article V, Section 121 of the Charter." Memorandum, Art. IV § 4. Under the city charter, a battalion chief vacancy was filled by the Chief selecting one of the top five candidates from the battalion chief eligibility list.

Waas was responsible for implementing the reorganization of the fire department. During the planning period for implementation of the new fire plan from July 9, 1976, to May 1, 1977, Germann became convinced that Waas was not going to follow the Memorandum of Understanding in implementing the plan. Germann believed that he knew more than Waas about how to interpret the Memorandum of Understanding because Germann helped negotiate the agreement.

From May 1, 1977, into 1979, the city attempted to implement the new work schedule. It was a period of turmoil and conflict between the union and the management of the fire department. One deputy fire chief accurately described the situation as a "we" against "them" atmosphere rather than "us" against the problem of how best to operate the fire department. Germann, as president of the union, vigorously led the union in opposing the manner in which the fire plan was being implemented by the fire department management. He repeatedly expressed his belief that the manner in which the city was attempting to implement the plan violated union members' rights.

Waas believed that it was his responsibility as chief to find a way to implement the city's fire plan while maintaining the fire fighting capability of the department. Waas' efforts to implement the fire plan put him squarely

in the middle of the heated dispute between the union and the city. During this tumultuous period Waas needed chief officers whom he could count on to project his policies in the field. Because the situation in the field was constantly changing, Waas could not personally make and carry out all of the decisions necessary to implement the fire plan. Waas had to rely on his deputy chiefs and battalion chiefs to implement diligently and faithfully the city's fire plan, and apply his general directives to new situations.

The change from a twenty-four hour shift to an eight hour shift required more personnel at virtually every level of the fire department, including battalion chief. There were seven battalion chief openings from September 21, 1977, to April 6, 1980, when Waas retired. During the period from September 21, 1977, to September 19, 1979, Germann was ranked number one on the battalion fire chief eligibility list.[1] Whenever a battalion chief vacancy occurred, a certification list was prepared showing the current ranking of people on the battalion chief eligibility list. Waas made seven appointments from certification lists based on the September 21, 1977, battalion chief eligibility list:

1) On May 22, 1978, the third person on the certification list was promoted.

2) On June 19, 1978, the second and fifth people on the certification list were selected.

3) On August 28, 1978, the third person on the certification list was selected.

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1. Germann was ranked third on the September 18, 1979, eligibility list which was in effect for the balance of Chief Waas' tenure. However, no appointments were made from that list.

4) On January 29, 1979, the third and fourth persons on the certification list were promoted.

5) On April 23, 1979, the fifth person on the certification list was selected.[2]

Waas considered Germann for each of these vacancies but did not promote him.[3] On only one occasion was Germann the only person skipped over to reach the person selected by Waas for promotion. On two occasions Waas skipped over Germann and three others to reach the name selected. Germann was not the only person ranked in the top five on the September 21, 1977, eligibility list who was not selected for promotion from that list. Two of the original top five names on the September 21, 1977, eligibility list were not selected for promotion during the period that this eligibility list was in effect.

Germann was not promoted because 1) Waas reasonably believed that to promote Germann to manage-

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2. Plaintiff's evidence in this case related to the reasons Waas failed to appoint Germann from the September 21, 1977, eligibility list. No evidence was introduced about any promotions made after April 9, 1980, the date defendant Wilson became Chief. Therefore, there is no factual basis for a claim against defendant Wilson.

3. Although Germann said that he talked to Thomas Lewinsohn about Waas' failure to promote him, Germann never filed a grievance with Lewinsohn who was Personnel Manager for the city. Germann conceded that Lewinsohn, was fair-minded and impartial. Germann testified that Lewinsohn, in contrast to Waas, never had gone back on his word. On December 6, 1978, Germann filed a charge of discrimination against Kansas City, John Waas and Robert Kipp, City Manager, with the Equal Employment Opportunity Commission. Germann alleged that he had been passed over for promotion because of his race.

> I have been passed over for promotion to the position of—battalion fire chief because of my race (white) due to the city of Kansas City's affirmative action plan. I have lost and continue to lose pay, fringe benefits, seniority rights, and eligibility for future promotions.

ment would threaten the efficiency, discipline and morale of the fire department; and 2) Waas reasonably believed that Germann would not resign from the union if promoted to battalion chief.

Waas' concern about the effect Germann's promotion would have on departmental efficiency, discipline and morale was based in part on a letter dated May 11, 1977, which Germann directed to "Chief Waas." Germann sent copies to city officials, other fire department officers, and union officials. Germann had the following to say in this letter about Waas and his efforts to implement the city's fire department policy:

> In answer to your letter of May 6, how dare anyone who has done as much as you to tear the Kansas City Fire Department to shreds accuse someone else of attempted obstruction or alteration. With your hand at the controls, the Kansas City Fire Department could not possibly be more completely obstructed by anyone else on the face of the earth.
>
> Nothing would suit me better than to have a Fire Chief who would read and understand his own rules, give his word on an issue and then not violate his own word by his every action as you have. . . .
>
> . . . .
>
> If you are really interested in seeing the Memorandum upheld, I suggest some study courses for yourself and the rest of the chief officers under the direction of someone who does not carry such a pitifully twisted outlook toward the employees of the department as you seem to have developed. . . .

Discipline and morale in the department depended on respect being shown to rank. Waas reasonably believed

that the tone and content of this letter was personally insulting and an inappropriate response to his letter of May 6.[4] Germann's letter confirmed Waas' belief that Germann did not respect him and would not work under Waas' leadership to implement the city's fire plan. Waas reasonably believed that the letter illustrated the threat Germann posed to a harmonious leadership team dedicated to implementing city fire department policy.

In early June, 1978, before the June 19, 1978, promotions were announced, Waas telephoned Germann. Germann testified that Waas told him that he would have to resign as union president *before* Waas would consider promoting him. According to Germann, he replied that he would not resign from the union *until* he was promoted. Mrs. Germann heard her husband's end of the conversation and had the "feeling" that he would resign from the union if promoted.

Waas recalled that he telephoned Germann to confirm that he would comply with the ordinance and resign from the union if appointed battalion chief. Germann told him that he planned to continue as president of the union for another term. Therefore, Waas concluded that Germann

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4. Germann claimed that this letter was a justified response to Waas' letter of May 6 which read as follows:

> This is to register my objection to the officers of Local #42 of the fire fighters' union making frequent visits to the Deputy Chief's office at Fire Station #10 to obstruct and try to alter the operation of the Fire Department.
>
> This practice is in direct violation of the Memorandum of Understanding, which sets forth a Labor/Management Committee to review procedures. I respectfully request that you refrain from any further such practice.

The reasonable, businesslike tone of Waas' May 6 letter stands in stark contrast to the emotional, personal and hostile tone of Germann's response.

was not interested in being considered for promotion because Germann could not be a member of the union and battalion chief.

At the time Waas telephoned Germann, Germann was leading a state court challenge to the validity of the ordinance prohibiting battalion chiefs from joining the same union as rank and file employees of the department. Therefore, it was entirely reasonable for Waas to attempt to determine whether Germann would accept promotion and then refuse to resign from the union in order to focus the issues in the lawsuit. Waas did not need another problem at that time.

Germann's testimony about the telephone conversation clearly revealed a personal hostility toward and suspicion of Waas. Germann believed that Waas was trying to trick him into resigning as union president without having any intention of promoting him. As a result of Germann's suspicion about Waas' motives and his hostility toward Waas, his responses to Waas' inquiries were evasive. In the context of the times, Waas reasonably concluded that Germann was saying that he was not interested in joining the management team that he had been so vigorously opposing. Waas reasonably believed that Germann had told him that he would not resign from the union if selected for promotion.

In early 1979, after the January 29, 1979, promotions were announced, an incident occurred in Waas' office which further confirmed Waas' concern about Germann's suitability for promotion to battalion chief. Germann and Waas sharply differ on what happened at this meeting. Waas testified that Germann came into his office by himself and demanded to know why he had not been promoted to battalion chief. Waas declined to respond because of

Germann's hostile attitude. Germann then leaned over his desk, shook his fist at Waas, and called Waas a "chicken shit."

Germann testified that he went to see Waas both as president of the union and personally to make inquiry about why he had not been promoted. According to Germann, all Waas would say is that Germann had not been appointed because of "certain activities." Germann attempted to get Waas to agree that "certain activities" referred to Germann's actions representing the union. Waas would neither admit nor deny Germann's suspicion. Germann denied that he called Waas a "chicken shit" and that he shook his fist at Waas. Germann conceded that he accused Waas of not having "guts" enough to state the real reason for not promoting him. Two union officials who testified that they were with Germann supported Germann's version of this meeting.

The Court is convinced that Waas' version is closer to the truth than Germann's. The emotion still evident in Germann's voice when he testified about the meeting strongly indicates that the discussion was not as calm as Germann's testimony would lead one to believe. The Court believes that Germann verbally attacked and berated Waas. Waas' dismay at the intensity of Germann's attack was still apparent as he testified about the event.[5] However, even if Germann's version of this meeting were entirely credible, Germann's accusation that Waas did not have "guts" enough to give Germann the real reason for not appointing him substantiates the reasonableness of

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5. An article in the Kansas City Star dated February 8, 1979, quoted John Tvedten a union official at the time, as follows: "He [Germann] went in there and told him [Waas] how the hog ate the cabbage." Tvedten testified at trial that a hog goes after cabbage "vociferiously."

Waas' conclusion that to promote Germann to Waas' management team would threaten the institutional efficiency of the fire department.

On approximately forty different occasions from November 22, 1977, to October 31, 1979, Germann was assigned to work temporarily as a battalion chief. Working out of class was intended in part to give people on the eligibility list for promotion experience in the position they were seeking. Germann was assigned temporary duties as battalion chief by a deputy chief and not by Waas. The fact that Germann worked out of class so frequently indicated that he was qualified for battalion chief, a conclusion not contested by defendants. However, Germann's temporary assignment to battalion chief duties does not indicate that he was the best qualified for promotion to a permanent position on Waas' management team.

In promoting seven people off the September 21, 1977, eligibility list, and in not promoting Germann, Waas reasonably exercised the discretion vested in him by the City Charter and the Memorandum of Understanding with the union. Waas' refusal to promote Germann was not in retaliation for his union activities. Germann was not promoted by Waas because Germann's behavior demonstrated that he would not comply with and work diligently to support the city's fire department policies. Waas reasonably concluded that to promote Germann to management would threaten the efficiency, discipline and morale of the fire department.

Conclusions of Law

This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1343. Plaintiff alleges a violation of 42 U.S.C. § 1983.

The City may not condition public employment on a basis which infringes on an employee's constitutionally protected interest in freedom of expression. *Connick v. Myers,* 103 S.Ct. 1684 (1983). Public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation" of the department in which they work. *Pickering v. Bd. of Education,* 391 U.S. 563, 568 (1968). "The first amendment restrains the government from retaliating against a public employee on the basis of the employee's speech or associations." *Hughes v. Whitmer,* 714 F.2d 1407, 1418 (8th Cir. 1983).

In *Hughes,* the Eighth Circuit Court of Appeals considered whether the Missouri Highway Patrol had transferred Hughes in order to retaliate against him for protected speech-related activities. The Court emphasized that the First Amendment rights of government employees are subject to the state's interest in providing efficient public services.

> While government employees do not relinquish their first amendment rights when they enter public service, those rights, unlike the rights of the citizenry-at-large, are subject to the state's paramount interest in promoting the efficiency of the public services it performs through its employees. *Rosado v. Santiago,* 562 F.2d 114, 117 (1st Cir. 1977); *Santos v. Miami Region, U.S. Customs Service,* 642 F.2d 21, 25 (1st Cir. 1981). As the Supreme Court emphasized in *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-1735, 20 L.Ed.2d 811 (1968), "the state has interests as an employer in regulating the speech of its employees that differ significantly from

> those it possesses in connection with regulation of the speech of the citizenry in general." Accordingly, public employers may legitimately curtail the speech activities of their employees to promote efficiency, loyalty, and departmental morale, provided these interests outweigh the employees' speech interest. *Id.* Therefore, in determining whether the transfer here infringed Hughes' first amendment rights, our duty as enunciated by the Court in *Pickering* is to weigh Hughes' interests in speaking and gathering information against the Patrol's interest in promoting efficiency, discipline and morale. In weighing these interests, we are to consider both the nature of the employment relationship and the nature of the speech activity involved. *Pickering v. Board of Education,* 391 U.S. 563, 569-73, 88 S.Ct. 1731, 1735-1737, 20 L.Ed.2d 811.

Id. 714 F.2d at 1418-19 (footnote omitted).

In considering the governmental interests at stake, the Court commented about the Missouri Highway Patrol in terms that are equally applicable to the Kansas City, Missouri, Fire Department:

> More so than the typical government employer, the Patrol has a significant government interest in regulating the speech activities of its officers in order "to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution." *Gasparinetti v. Kerr,* 568 F.2d 311, 315-316 (3d Cir. 1977), *cert. denied,* 436 U.S. 903 (1977); *also see* Note, *Free Speech and Impermissible Motive in Dismissal of Public Employees,* 89 Yale L.J., 376, 381 n.14 (1979). As the Supreme Court recognized in *Kelley v. John-*

> *son*, 425 U.S. 238, 246-47 (1976), a police department has a substantial interest in developing "discipline, *esprit de corps*, and uniformity" within its ranks so as to insure the safety of persons and property.

Id. 714 F.2d at 1419 (citations omitted). See also, *Chappell v. Wallace*, 103 S.Ct. 2362 (1983), where in articulating the limited role the judicial branch has in reviewing military decisions affecting a soldier's constitutional rights, the Supreme Court was concerned about the "disruption of '[t]he peculiar and special reliationship of the soldier to his superiors' that might result if the soldier were allowed to hale his supervisor into court." *Id.* at 2367 (quoting *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 676 (1977) which quoted *United States v. Brown*, 348 U.S. 110, 112 (1954)).

While the organization of the Kansas City Fire Department may differ somewhat from the Missouri Highway Patrol and the military, a "fire department, like police department, has greater than normal government interest in maintaining morale and discipline." *Hughes*, 714 F.2d at 1419. Promoting efficiency, fostering loyalty and obedience to superior officers, and maintaining morale in the fire department are reasonable governmental interests.

In *Hughes*, the Court concluded that the transfer did not infringe on Hughes' First Amendment rights.

> In striking the *Pickering* balance in this case, we are compelled to emphasize that free speech claims are not to be considered in a vacuum but must be viewed in light of the circumstances and in the context of all relevant conditions existing at the time of the asserted free speech activities. *Nor should free speech rights be utilized to provide immunity to other actions that merit condemnation, discipline or sanctions as-*

> *sessed in the public interest. See Mt. Healthy,* 429 U.S. at 285-86, 97 S.Ct. at 575-76. *The public weal demands that public officials carry out their duties and responsibilities so that their offices are run efficiently, harmoniously and responsive to the administration of the public service they are employed to perform.* In particular, paramilitary units have a need to uphold morale, and *espirit de corps* and an affirmative public image.

Hughes, 714 F.2d at 1425 (emphasis added). *See also, Connick,* 103 S.Ct. at 1694.

The efficient, harmonious and responsive administration of government is more likely to be threatened where a close working relationship exists between employer and employee. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick,* 103 S.Ct. at 1692. *See also Hughes,* 714 F.2d at 1419-20.

In this case Germann was seeking promotion to a management position with the fire department where personal loyalty to Chief Waas and his programs was essential. During the 1977-1979 period, Waas relied on his battalion chiefs to implement, on a day-by-day basis, the city's fire plan in the face of persistent and rigorous union opposition. Close supervision was impossible; loyalty to Waas and the city was essential.

In light of the substantial governmental interest in the efficient operation of the fire department and in light of the nature of the employment relationship between Waas and his battalion chiefs, the significance of the tone and content of the May 11, 1977, letter is apparent.

> In answer to your letter of May 6, how dare anyone who has done as much as you to tear the Kansas City Fire Department to shreds accuse someone else of attempted obstruction or alteration. With your hand at the controls, the Kansas City Fire Department could not possibly be more completely obstructed by anyone else on the face of the earth.
>
> Nothing would suit me better than to have a Fire Chief who would read and understand his own rules, give his word on an issue and then not violate his own word by his every action as you have. . . .
>
> . . . .
>
> If you are really interested in seeing the Memorandum upheld, I suggest some study courses for yourself and the rest of the chief officers under the direction of some one who does not carry such a pitifully twisted outlook toward the employees of the department as you seem to have developed. . . . It might also be enlightening at this time to study the Preamble of the Memorandum of Understanding, so you could charge yourself with the many violations you have created or allowed to exist since its signing in July, 1976.

The letter was a personal communication between Germann and his superior officer, Fire Chief Waas.

> Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979).

In this letter, Germann accuses the head of the department of being a liar and of destroying the fire department. The letter carries the clear message that Germann personally dislikes Waas, has no respect for him, and believes that Waas is destroying the fire department.[6]

No great effort need be exerted to appreciate the reasonableness of Waas' decision not to promote Germann to his management team after he received Germann's May 11, 1977, letter. The letter graphically demonstrates to any reasonable person that a relationship of trust and confidence between Waas and Germann would be difficult to achieve. The letter is not of such public and social importance as to override the City's compelling public safety interest in having a fire department managed by commanding officers loyal to the Fire Chief.

Germann's distribution of copies of the letter to other members of the fire department and union officials did not transform an essentially personal communication into public speech. In fact, the distribution of copies only aggravated the effect on institutional efficiency, discipline and morale by publicizing within the department Germann's accusations against and attitude towards Waas and his policies. Efficient operation of the fire department in accordance with policies adopted by elected officials would be impossible if the First Amendment required the promotion to management of people who it is reasonably believed would not work diligently to implement those city policies and who have no loyalty to or respect for the Fire Chief.

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6. Germann suggested that this letter could not fairly be interpreted as expressing his personal views. The tone and form of the communication speak forcefully to the contrary.

Furthermore, before June 19, 1978, Germann had told Waas that he wanted to remain president of the union for another term. Waas reasonably concluded that Germann was not interested in promotion at that time and that he would not comply with the city ordinance and resign from the union if he was promoted. Not only was this another indication of Germann's refusal to follow city fire department policy, but it provided an independent basis for Waas not promoting Germann. Simply put, Germann was more interested in leading his union at that time than joining management. No constitutional right is implicated by Waas' reasonable reliance on Germann's voluntary choice to remain as union president for another term. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86 (1977).

After the January 29, 1979, appointments, Germann confronted Chief Waas in the privacy of his office. Germann told Waas that he did not have "guts" enough to respond to Germann's belligerent inquiry about why Germann had not been promoted, he leaned over Waas' desk and shook his fist at Waas, and he called Waas, his superior officer, a "chicken shit."[7] No reasonable analysis can conclude that those were acts or comments addressing a matter of public concern. Subordinates who curse and threaten their superiors must accept the reasonable consequences of their acts.

Certainly Germann had the right to join and work for his union and to express himself personally and as union president on implementation of the fire plan. Ger-

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7. In the context of the conflict between the union and the city, it is not surprising that Germann would attack Waas ostensibly for not promoting him even though he had told Waas earlier he was not interested in promotion at that time.

mann fully enjoyed these rights unimpeded by defendants. However, Germann's argument that anything he said or did as president of the union cannot be considered in deciding who to promote to management of the fire department turns the First Amendment on its head. Paraphrasing the Supreme Court's conclusion in *Connick*, "it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with" this attempt to shroud with constitutional protection behavior reasonably believed to be destructive to governmental efficiency. 103 S.Ct. at 1694.

In *Nathanson v. United States*, 702 F.2d 162 (8th Cir. 1983), Nathanson, an employee of the Corps of Engineers contended that he had been terminated because of his views on environmental policy. The Court stated that under *Pickering* both the content of speech and whether it is conveyed privately or to the general public must be considered.

> We find there was ample evidence for the district court to view Nathanson's argumentative discussions with his superiors as disruptive conduct threatening the efficiency of performance of his duties. . . . Whether Nathanson's views were right or wrong, Parsons responded to them as behavior that was deemed bordering on insubordination. We emphasize it was not the expression of his views that the district court found led to his dismissal. Parsons did not fire Nathanson because he was an environmentalist and disagreed with the policy of the office. True, the evidence allows Nathanson to argue as much; however, the district court is the finder of fact. The district

> court found that because Nathanson possessed such strong views he could not efficiently carry out his duties in processing the permits. . . .
>
> . . . .
>
> We agree that the institutional efficiency of the Corps was not threatened by the content of Nathanson's views. He had every right to express these views to his superiors. However, the manner, time, and place in which he expressed these views clearly inhibited his performance in processing permits directed by his superiors.

Id. at 165-66.

Here, as in *Nathanson*, the governmental interests in promoting the efficiency and morale of a department with a crucial public safety mission outweigh Germann's interest in speaking in the manner, time, and place which he chose. Where close working relationships are essential to fulfilling public responsibility, a wide degree of deference must be accorded the employer's judgment on who to promote to management. Therefore, when defendants Kansas City and John Waas failed to promote Germann, his First Amendment rights were not infringed. To conclude otherwise would put this Court in the intolerable position of reviewing a wide range of discretionary governmental employment decisions. Neither the United States Constitution nor Congress envisioned such an intrusive role by federal courts in the operation of state and local government.

Having concluded that Germann was not discriminated against because he was a member of the union or because of any proposal made by him to the city relative to salaries or working conditions, plaintiff's state claim grounded on § 105.510 R.S.Mo. fails.

For the reasons stated, judgment is hereby granted in favor of the defendants City of Kansas City, Missouri; Edward Wilson; and John Waas, and against the plaintiff John Germann. Costs of this action are assessed against the plaintiff.

IT IS SO ORDERED.

/s/ D. Brook Bartlett
D. Brook Bartlett
United States District Judge

Kansas City, Missouri
January 31, 1984.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1261WM

John Germann,
Appellant,

vs.

City of Kansas City, et al,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the said district court is affirmed in accordance with the opinion of this Court.

November 6, 1985

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1261-WM

John Germann,
Appellant,

vs.

City of Kansas City, et al.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 27, 1985

APPENDIX "E"

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
AFL-CIO
OF KANSAS CITY, MISSOURI
6528 Stadium Drive
Kansas City, Missouri 64129
Telephone (816) 921-9407
LOCAL UNION NO. 42

May 11, 1977

Mr. John Waas, Fire Chief
City Hall - 22nd Floor
414 East 12th Street
Kansas City, Missouri 64106

Chief Waas:

In answer to your letter of May 6, how dare anyone who has done as much as you to tear the Kansas City Fire Department to shreds accuse someone else of attempted obstruction or alteration. With your hand at the controls, the Kansas City Fire Department could not possibly be more completely obstructed by anyone else on the face of the earth.

Nothing would suit me better than to have a Fire Chief who would read and understand his own rules, give his word on an issue and then not violate his own word by every action as you have. I refer specifically to your promise at our last Labor/Management Committee meeting on April 12, 1977 to rescind a portion of a directive sent out by you in an effort to intimidate employees into donating from thirty minutes to an hour each day to the

Kansas City Fire Department. Your word was given on this issue before Mr. John Burge, Mr. Tom Lewinsohn, Deputy Chief Louis Hansen and Battalion Chief Richard Baker as well as all Union representatives present. *To this date, that action has not been taken.*

As to the phony charge of a direct violation of the Memorandum of Understanding, that statement only serves to further expose your ignorance of the Memorandum. Article XX, Section 6, paragraph (e) specifically states "This does not preclude officers or other supervisors of the Fire Department from meeting with stewards or other designated Union representatives on an informal basis."

If you are really interested in seeing the Memorandum upheld, I suggest some study courses for yourself and the rest of the chief officers under the direction of someone who does not carry such a pitifully twisted outlook toward the employees of the department as you seem to have developed. At these sessions, perhaps you could learn the meaning of some new words contained in Article VI, Section 6. Overtime Assignment, such as "offer", "volunteer", "opportunity", etc. It might also be enlightening at this time to study the Preamble of the Memorandum of Understanding, so you could charge yourself with the many violations you have created or allowed to exist since its signing in July, 1976.

Sincerely,

/s/ John Germann
John Germann
President

JG/pv

cc: John Burge, Assistant City Manager
Thomas Lewinsohn, Director of Personnel
Frank Spink, Director of Fire
Bob Herchert, Assistant City Manager
Louis Hansen, Deputy Chief
Charles Fisher, Deputy Chief
Edward Wilson, Deputy Chief
Bennie Imperiale, Deputy Chief
Richard Baker, Battalion Chief
Don Riley, Secretary-Treasurer, Local 42
Larry Gepford, Attorney
Dan Jackson, City Attorney

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Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1588

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN GERMANN, *Petitioner,*

vs.

CITY OF KANSAS CITY, MISSOURI, HONORABLE RICHARD BERKLEY, ROBERT KIPP, JOHN WAAS, THOMAS LEWINSOHN, EDWARD WILSON, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Is the speech of a public employee serving as President of a public employee's Union allegedly addressed to an issue of public concern and allegedly uttered in the context of bargaining entitled to carte blanche First Amendment protection or must the interest of the employee in so speaking be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees?

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No. 85-1588

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN GERMANN, *Petitioner,*

vs.

CITY OF KANSAS CITY, MISSOURI, HONORABLE RICHARD BERKLEY, ROBERT KIPP, JOHN WAAS, THOMAS LEWINSOHN, EDWARD WILSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

Respondents adopt the Opinions Below cited by Petitioner.

JURISDICTION

Respondents adopt the Jurisdictional Statement of Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents adopt Petitioner's Statement of Constitutional Provisions involved.

STATEMENT OF THE CASE

Petitioner John Germann brought this action against the City of Kansas City, Missouri, the Mayor, Honorable Richard Berkley, the City Manager, Robert Kipp, retired Fire Chief John Waas, Personnel Director Thomas Lewinsohn and Fire Chief Edward Wilson. Suit was brought under 42 U.S.C. §1983 and §105.510 R.S.Mo. alleging violation of Petitioner's right to freedom of speech as secured by the First and Fourteenth Amendments to the Constitution of the United States of America, claiming that the City of Kansas City, John Waas, and Edward Wilson violated his constitutional rights by not promoting him to the management rank of battalion chief. Specifically Petitioner alleged that Defendants refused to promote him because of what he said as President of the Union and because of his Union Membership.

At all times material to this action, Petitioner held the rank of Fire Captain, the highest non-management position in the Kansas City Fire Department. Petitioner was also President of the Local Fire Fighter's Union, IAFF, AFL-CIO, Local No. 42 from January 1, 1976, to December 31, 1981. Respondent John Waas was the Fire Chief until his retirement April 6, 1980, and Edward Wilson was Waas' successor. Petitioner produced no evidence of any promotions made after April 6, 1980, thereby stating no factual basis for a claim against Defendant Wilson. Likewise, no claim was stated against the Mayor, the City Manager or the Personnel Director.

There were seven (7) battalion chief openings from September 21, 1977, to April 6, 1980, when Waas retired. During the period from September 21, 1977, to September 19, 1979, Petitioner was ranked Number One on the Bat-

talion Fire Chief Eligibility List. Petitioner was ranked third on a new eligibility list established September 18, 1979, however no appointments were made from that list. Whenever a battalion chief vacancy occurred, a certification list was prepared showing the current ranking of people on the Battalion Chief Eligibility List. Respondent Waas made seven (7) appointments from the certification list based on the September 21, 1977, Battalion Chief Eligibility List:

1. On May 22, 1978, the third person on the certification list was promoted.

2. On June 19, 1978, the second and fifth persons on the certification list were selected.

3. On August 28, 1978, the third person on the certification list was selected.

4. On January 29, 1979, the third and fourth persons on the certification list were promoted.

5. On April 23, 1979, the fifth person on the certification list was selected.

Respondent Waas considered Germann for each of these vacancies but did not promote him. Petitioner never filed a grievance with the City's Personnel Director. On December 6, 1978, Petitioner filed a charge of discrimination against the City, John Waas and the City Manager with EEOC alleging that he had been passed over for promotion because of race. Petitioner did not file a lawsuit within ninety (90) days after securing his "right to sue letter". On only one (1) occasion was Petitioner the only person skipped over to reach the person selected by Waas for promotion. On two (2) occasions Waas skipped over Petitioner and three (3) others to reach the name selected.

Petitioner was not the only person ranked in the top five (5) on the September 21, 1977, eligibility list who was not selected for promotion from that list. Two (2) of the original top five (5) names on the September 21, 1977, eligibility list were not selected for promotion during that period that the list was in effect. Petitioner was not promoted by Waas because (1) Waas reasonably believed that to promote Petitioner to management would threaten the efficiency, discipline and morale of the Fire Department; and (2) Waas reasonably believed Petitioner would not resign from the Union if promoted to battalion chief.

Waas' concern about the effect Germann's promotion would have had on Department efficiency, discipline and morale was based in part on a letter included in Petitioner's Petition as Appendix "E", in part upon a telephone conversation with Petitioner in 1978 and in part upon a mini-insurrection that occurred in early 1979 in the Fire Chief's office.

ARGUMENT

The decision below, is correct. There is no conflict or any other basis for further review by this Court. The decision below does not represent a conflict of position between the respective Circuits nor is there as substantial Federal question.

Petitioner argues that the Court of Appeals misconstrued and misapplied the standard established by the Supreme Court for assessing the degree of protection the First Amendment to the Constitution affords all public employees when speaking of issues of public concern citing the cases of *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and *Connick v.*

Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) as the basis for the correct standard. Identification of protected speech after *Connick* is a two-step process:

(1) The speech must have addressed "a matter of public concern", 461 U.S. at 143, 146, and

(2) Then, the interest of the employee in so speaking must be balanced against "the interest of the State, as an employer in promoting the efficiency of the public service it performs through its employees." *Pickering,* 391 U.S. at 568.

This "*Pickering* balance" as it has come to be known, looks at the following factors:

(1) The need for harmony in the office or work place;

(2) Whether the government's responsibilities require a close working relationship to exist between Plaintiff and co-workers (in this case between Petitioner and Waas) when the speech in question has caused or could cause the relationship to deteriorate;

(3) The time, manner, and place of the speech;

(4) The context in which the dispute arose;

(5) The degree of public interest in the speech; and

(6) Whether the speech impeded the employee's ability to perform his or her duties. *Germann v. City of Kansas City, Missouri,* 776 F.2d at 764.

Petitioner suggests that a close working relationship would not have been required between the fire chief and the battalion chief had Petitioner been promoted thereby negating any perceived threat to the efficiency, discipline and morale of the Fire Department. Such a position is

misplaced. Indeed, Petitioner in the case of *Germann v. City of Kansas City, Missouri*, 577 S.W.2d 54 (KCD 1978), mot. reh. or tfr. den. 1979 stipulated that l.c. 56:

> ". . . In the absence of the chief of the Fire Department, a deputy chief acts as chief. In turn, in the absence of a deputy chief, including absence due to acting temporarily as fire chief, a battalion chief acts as deputy fire chief. In addition, during weekends and certain week day hours, a battalion chief is the ranking officer on duty and is in charge of the Fire Department."

The Court went on to hold l.c. 56:

> "Clearly, the battalion chiefs occupy one of the most responsible positions in the Kansas City Fire Department and it is beyond question that an irreconcilable conflict of interest may well arise when they act as the officer in charge of the entire Department and hold union membership with the Fire Fighters. Decisions which must be made objectively for the best operation of the Department may be in opposition to a position assumed by the Union. For the reasons fully explained in *Elk Grove* (400 F.Supp. 1097 (N.D. Ill. 1975) aff'd unpublished order 539 F.2d 714 (7th Cir. 1976)). This Court holds "that the prohibition of battalion chiefs from holding membership in the same Union as the Fire Fighters they supervise serves a legitimate State interest and the restriction of their First Amendment rights is the least drastic restriction to accomplish this purpose."

The Trial Court in *Germann v. City of Kansas City, Missouri*, 579 F.Supp. 180, 184 (WD Mo. 1984) found:

> "Discipline and morale in the department depend on respect being shown to rank. Waas reasonably be-

lieved that the tone and content of this letter (Appendix "E") was personally insulting and an inappropriate response to his letter of May 6. (Appendix "A-3") Germann's letter confirmed Waas' belief that Germann did not respect him and would not work under Waas' leadership to implement the City's fire plan. Waas reasonably believed that the letter illustrated the threat Germann posed to a harmonious leadership team dedicated to implementing the City's fire department policy. . . In early 1979, after the January 29, 1979, promotions were announced, an incident occurred in Waas' office which further confirmed Waas' concern about Germann's suitability for promotion to battalion chief. Germann and Waas sharply differ on what happened at that meeting. Waas testified that Germann came into his office by himself and demanded to know why he had not been promoted to battalion chief. Waas declined to respond because of Germann's Hostile attitude. Germann then leaned over his desk, shook his fist at Waas, and called Waas a "chicken shit".

Germann testified that he went to see Waas both as President of the Union and personaliy to make inquiry about why he had not been promoted. According to Germann all Waas would say is that Germann had not been appointed because of "certain activities". Germann attempted to get Waas to agree that "certain activities" referred to Germann's actions representing the Union. Waas would neither admit nor deny Germann's suspicion. Germann denied that he called Waas a "chicken shit" and that he shook his fist at Waas. Germann conceded that he accused Waas of not having "guts" enough to state the real reason for not promoting him. Two Union officials

who testified that they were with Germann supported Germann's version of the meeting.

The Court is convinced that Waas' version is closer to the truth than Germann's. The emotions still evident in Germann's voice when he testified about the meeting strongly indicates that the discussion was not as calm as Germann's testimony would lead one to believe. The Court believes that Germann verbally attacked and berated Waas. Waas' dismay at the intensity of Germann's attack was still apparent as he testified about the event.[5] However, even if Germann's version of this meeting were entirely credible, Germann's accusation that Waas did not have the "guts" enough to give Germann the real reason for not appointing him substantiates the reasonableness of Waas' conclusion that to promote Germann to Waas' management team would threaten the institutional efficiency of the Fire Department.

5. An article in the Kansas City Star dated February 8, 1979, quoted John Tvedten a union official at the time, as follows: "He [Germann] went in there and told him [Waas] how the hog ate the cabbage." Tvedten testified at the trial that a hog goes after cabbage "vociferiously" (sic)."

Petitioner submits that this decision should be decided along the lines of *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir 1985), cert. pend. *Gonzalez* is distinguishable from Germann because of *Gonzalez's* lack of hostility to his superiors. The Court stated at 1303:

"When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the

content of the employee's message, but also by the manner, time and place in which it is delivered." *Givhan v. Western Line Consolidated School District*, 1979, 439 U.S. 410, 439 N. 4, 99 S.Ct. 693, 701 N. 4, 58 L.Ed.2d 619. We agree with the district court's conclusion that "there was nothing about the manner, time or place of Gonzalez's statement that would justify his dismissal". *Gonzalez was polite throughout his exchanges with the Commissioners' Court. He did not launch personal attacks on the commissioners.* At several points he offered to cooperate in amending the CAA procedures to meet the commissioners' wishes. As the district court found, Gonzalez's conduct could not be characterized as a "mini-insurrection". Cf. Connick, 461 US at 141, 103 S.Ct. at 1687." (Emphasis supplied)

It is quite clear that the May 11, 1977, letter (Appendix "E") was not the sole basis for the Trial Court's denial of relief. The Eighth Circuit Court of Appeals in denying "protected status" to the May 11 letter correctly applied the balancing tests mandated by *Connick* and *Pickering*. The Court went on to find that it was unnecessary to perform a *Pickering* analysis of the 1978 telephone conversation or the 1979 name calling incident but noted that these incidences are indicative of Appellant's continuing hostility and disrespect for Waas.

Judge Heaney's dissent found the majority opinion to be "unadulterated nonsense" and the record capable of supporting a diametrically opposed result. Where there are two (2) permissible views of the evidence, and the District Court has carefully analyzed the demeanor and credibility of the witnesses, the standard of review is the "clearly erroneous" standard. This was most

recently enunciated in the case of *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); F.R. Civ. P. 52; which held that when findings are based upon determinations regarding the credibility of witnesses, Rule 52 F.R. Civ. P. demands even greater deference to the Trial Court's findings; for only a Trial Judge can be aware of the variations in demeanor and the tone of voice that bears so heavily on the listener's understanding of the belief in what is said. This Court should not countenance a personal attack on a superior, and a vociferous mini insurrection to be protected under the First Amendment to the United States Constitution thereby mandating the promotion of a perceived disloyal subordinate.

CONCLUSION

The ruling by the Eighth Circuit Court of Appeals does not present an important question of Federal law unsettled by this Court or one in conflict with the applicable decisions of this Court or a case otherwise calling for the supervision of the Supreme Court of the United States. The Petition should therefore be denied.

Respectfully submitted,

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